LIM ZI HONG

v.

PENGARAH HOSPITAL SELAYANG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG JC
[CIVIL SUIT NO: S-21-141-2009]
23 JULY 2013

TORT: *Negligence - Causation - Material contribution test*

TORT: *Negligence - Medical negligence - Negligence of doctors causing plaintiff to be born in state of asphyxia causing cerebral palsy - Failure to advise mother for elective caesarian section in view of her high risk - Failure to have safe obstetric system - Undue delay in carrying out emergency caesarian section - Whether breach of duty of care established - Whether breach of duty materially contributed to plaintiff's injuries - Whether liability of doctors established - Whether owner or operator of hospital vicariously liable*

TORT: *Negligence - Standard of care - Medical negligence - Whether accepted medical practice still useful guide in determining standard of care*

This was an action of damages for medical negligence in relation to the management and treatment during the delivery of the baby ('the plaintiff') by the agents and servants of Hospital Selayang which caused cerebral palsy to the plaintiff. The claim was grounded on negligence and breach of contract in the advice, diagnosis and treatment of the mother and the plaintiff resulting in the plaintiff being born in a state of asphyxia on 6 June 2006. The main issues of negligence pleaded were: (a) failure to advise the mother for an elective caesarian section in view that the mother was a high risk patient and the mother requesting for the same; (b) failure to have a safe obstetric system in Hospital Selayang when the decision to carry out emergency lower segment caesarian section was made at 9.40pm and the emergency caesarian section was only carried out at 10.25pm and the plaintiff was delivered at 10.34pm; and (c) whether the defendants met the standard of care expected of the doctors treating the plaintiff and the plaintiff's mother, the issue of causation and the liability of the first two defendants namely vicarious liability or non-delegable duty wherein the owner or operator of the hospital was liable for the acts of it's servants and/or agents or if there was system failure direct liability of the first and second defendants. On 6 June 2006 at around 11.20am, the plaintiff's mother went to Hospital Selayang, with a complaint of irregular contractions and arising from the examination conducted by the

defendants' agents, it showed, among others, that the plaintiff was in a cephalic presentation and the cervical 'os' was open at about 3 to 4cm. The defendants diagnosed her condition as fetal distress which then led to the decision of performing an emergency caesarian surgery. During the caesarian procedure, the plaintiff's head was found to be deeply engaged and the defendants' agents were having difficulty in delivering the plaintiff's head. A Pediatric Medical Officer was present when the plaintiff was born.

Held (allowing plaintiff's claim):

(1) Even if the question of reasonable standard of care now rests ultimately with the court and not with the medical profession, evidence of accepted medical practice is still a useful guide which the courts ought to have reference to, in order to assist them, to come to a finding; *Foo Fio Na v. Dr Soo Fook Mun & Anor* (refd). (para 16)

(2) In her witness statement, Dr Hazfaneeza did not state that she had counselled the mother and her husband since the mother was a high risk patient and a caesarian section should be conducted. However under cross-examination, Dr Hazfaneeza testified that she did give the option to the plaintiff's mother. There was no corroborative evidence that any such discussion took place between Dr Hazfaneeza and the plaintiff's mother or her husband, especially since the records did not reflect that such a discussion took place. Further, it was never put to the plaintiff's mother that the option for caesarian section or vaginal delivery had been discussed and the plaintiff's mother had opted for vaginal delivery. (para 21)

(3) The court preferred the testimonies of PW1, Dr Ong, an independent and eminent obstetrician and gynaecologist, whose expert reports P2 and P3, stressed the need that the plaintiff's mother should have been advised on the need for an elective caesarian section especially since she was a high risk patient and the failure to do so, was not in accordance with accepted obstetric practice. (para 30)

(4) The treatment given to the plaintiff and the plaintiff's mother on 6 June 2006 was not appropriate. The defendants knowing that the plaintiff's mother's pregnancy was a high risk, ought to have advised and planned for a possible caesarian section, by getting ready the operating theatre and/or have a specialist to handle the delivery of the plaintiff and attending to the plaintiff's mother. (paras 34 & 36)

(5) The defendants failed to have a safe obstetric system when the decision to carry out the emergency lower segment caesarian section of the plaintiff's mother was made at 9.40pm and the emergency caesarian section was only commenced at 10.25pm and the plaintiff was born at 10.34pm on 6 June 2006. There was an unexplained delay from the time of decision to conduct an emergency caesarian section to the time of delivery of the plaintiff which was 54 minutes and such delay was fatal. (paras 40 & 53)

(6) The law in respect of causation is that the plaintiff need only to prove, a material contribution by the defendant's breach of duty to the damage suffered by the plaintiff. The material contribution test has been laid down by the Federal Court in the case of *Wu Siew Ying t/a Fuh Lin Bud Grafting Centre v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor*. The plaintiff had proved on a balance of probabilities that the breach of duty by the defendants had materially contributed to the injuries suffered by the plaintiff namely involving cerebral palsy secondary to perinatal asphyxia epilepsy and left hemiplegia. (paras 64 & 67)

(7) There was system failure in the hospital at the material time, thus the first and second defendants were vicariously liable as the owner or operator of the hospital. (para 71)

Case(s) referred to:

Bailey v. Ministry of Defence [2008] EWCA Civ 883 ***(refd)***
Bull & Anor v. Devon Area Health Authority [1982] 22 BMLR 79 ***(refd)***
Cassidy v. Ministry of Health [1951] 1 All ER 574 ***(refd)***
Chung Chu Yin & Yang Lain lwn. Dr Jimmy Tang Sek Cheong & Satu Lagi [2012] 5 CLJ 86 HC ***(refd)***
Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor [2007] 5 CLJ 38 CA ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***
Hardaker v. Newcastle HA [2001] Lloyd's Rep Med 512 ***(refd)***
Jacob Mathew v. State of Punjab & Anor [2006] 6 CLJ 162 SC ***(refd)***
James v. Camberwell Health Authority [1994] 5 Med LR ***(refd)***
Liau Mui Mui v. Dr R Venkat Krishnan [1999] 1 CLJ 207 HC ***(refd)***
Mathew Scott Oakley & Ors v. Dr George Varughese & Anor [2010] 10 CLJ 322 HC ***(refd)***
Payremalu Veerappan v. Dr Amarjeet Kaur & Ors [2001] 4 CLJ 380 HC ***(refd)***
Roe v. Minister of Health [1954] 2 QB 66 ***(refd)***
Rogers v. Whitaker [1992] 175 CLR 479 ***(refd)***
Udhaya Kumar Karuppusamy & Anor v. Penguasa Hospital Daerah Pontian & Ors [2005] 1 CLJ 143 HC ***(refd)***
Wilsher v. Essex Area Health Authority [1988] All ER 871 ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the plaintiff - Sharmini Navaratnam; M/s Siva Dharma & Assocs
For the defendants - Zetty Zureena Kamaruddin; SFC

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JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is a claim by an infant, Lim Zi Hong ("the plaintiff") suing through his guardian and next friend, Madam Tan Yih Chiang who is his mother ("the mother"). The defendants in this suit are the Director of Hospital Selayang ("the first defendant"), the Government of Malaysia ("the second defendant") who are allegedly vicariously liable for the acts of their servants and/or agents, the doctors and specialists practising in Hospital Selayang ("the hospital").

[2] The doctors who attended to the plaintiff's mother, are the third defendant, Dr Irishah ("Dr Irishah"), the fourth defendant, Dr Noor Syam Yahya Luddin ("Dr Noor Syam"), the fifth defendant, Dr Hazfaneeza, the sixth defendant, Dr Shariza Shahar ("Dr Syariza") and the seventh defendant, Dr Syariahati.

[3] This is an action of damages for medical negligence brought against the agents and servants of Hospital Selayang employed by the defendants for claiming that negligence in the management and treatment during the delivery of the plaintiff by the agents and servants of Hospital Selayang which caused cerebral palsy to the plaintiff. The claim is grounded on negligence and breach of contract in the advice, diagnosis and treatment of the mother and the plaintiff resulting in the plaintiff being born in a state of asphyxia on 6 June 2006.

[4] The plaintiff called five witnesses namely, PW1, Dr Ong Hean Choon, PW2, Mr Shin Chin Ai, PW3, Dr Hj Mohd Noor Manukaran, PW4, Dr Ramnan Jeyasingam and PW5, Madam Tan Yih Chiang. The defendants also called five witnesses namely, DW1, Noor Azlin bin Mohd Sharif, DW2, Dr Hazfaneeza bte Ab Halim, DW3, Dr Noor Shan bte Yahya Luddin, DW4, Dr Syariza bte Shahar and DW5, Dr Chern Phei Ming.

The Plaintiff's Case

[5] The main issues as set out is the particulars of negligence pleaded, can be divided into three broad areas namely:

(a) Failure to advise the mother for an elective caesarian section in view that the mother was a high risk patient and the mother requesting for the same;

(b) Failure to have a safe obstetric system in Hospital Selayang when the decision to carry out emergency lower segment caesarian section was made at 9.40pm and the emergency caesarian section was only carried out at 10.25pm and the baby (plaintiff) was delivered at 10.34pm; and

(c) Whether the defendants has met the standard of care expected of the doctors treating the plaintiff and the plaintiff's mother, the issue of causation and the liability of the first two defendants namely vicarious liability or non delegable duty wherein the owner or operator of the hospital is liable for the acts of it's servants and/or agents or if there is system failure direct liability of the first and second defendants.

The Defendants' Case

[6] During the mother's 34th week of pregnancy, the plaintiff's mother went to Hospital Selayang on 8 May 2006 at about 4.07pm with a complaint of premature contractions. The defendants' agent noted the medical history of the plaintiff's mother and the plaintiff's mother underwent a thorough examination conducted by the defendants. After that, the plaintiff mother was admitted into the labour ward on the same day.

[7] As the plaintiff's mother was not having any indication of contractions and no sign of labour, the plaintiff's mother was discharged on 10 May 2006. On 6 June 2006 at around 11.20am, the plaintiff's mother once again went to Hospital Selayang, with a complaint of irregular contractions and arising from the examination conducted by the defendants' agents, it showed among others that the plaintiff was in a cephalic presentation and the cervical "os" was open at about 3 to 4cm. Next, artificial rupture of membrane was conducted on the plaintiff's mother and she was then sent to the labour room for monitoring purposes.

[8] The condition of the plaintiff and the plaintiff's mother were monitored at all material times by the defendants' agents using cardiotocograph method, ie, CTG. Later the same day, at about 8.33pm,

A the examinations conducted by the defendants on the plaintiff's mother showed that her contractions was 3 in 10 minutes and the plaintiff's cardiotocograph, ie, CTG monitoring was reactive and plaintiff was in a cephalic presentation. At about 9.40pm the same day, the cardiotocograph, ie, CTG showed bradycardia of the second twin baby of the plaintiff's B mother.

[9] The defendants diagnosed such situation as a fetal distress which then led to the decision of performing an emergency caesarian surgery on the plaintiff's mother and the defendants contended that the plaintiff's mother was informed and explanations were at all material time given C by the defendants with regards to the caesarian procedure and the plaintiff's mother herself, agreed to proceed with the said procedure.

[10] During the caesarian procedure, it was noted that the plaintiff's head was found to be deeply engaged and the defendants' agents were D having difficulty in delivering the plaintiff's head. A pediatric medical officer was present when the plaintiff was born and the plaintiff was given appropriate treatments and was immediately warded in NICU.

[11] The defendants contend that the plaintiff and plaintiff's mother was treated and managed in accordance with the appropriate standard of care E and acceptable medical practice in Hospital Selayang at all material time. Any complaints from the plaintiff's mother have been taken into consideration and medical treatment has been given accordingly. Thorough investigations and examinations were conducted on the plaintiff's mother, to ensure that appropriate treatments were administered F to her. All appropriate treatments were also given to the plaintiff at all material times.

[12] The defendants deny that there was any delay in the management and treatment of the plaintiff and the plaintiff's mother at Hospital Selayang and that appropriate treatment by defendants' agents who are G experienced and specialised in their respective fields, at Hospital Selayang.

[13] The birth of plaintiff was not because of any action or omission that give rise to any negligence by defendants. The plaintiff's mother was informed and explanations were given, pertaining to the caeserian H procedure, at all material time given and the plaintiff's mother herself had given her consent to proceed with the procedure.

The Defendants' Issues To Be Tried

[14] The defendants contended that the followings are the issues arising I for this court's determination:

(a) Whether the treatment given to the plaintiff and the plaintiff's mother on 6 June 2006 was appropriate?;

(b) Was there any delay in delivering the plaintiff on 6 June 2006?; A

(c) Whether plaintiff's mother consented to the caesarean procedure conducted by the defendants on 6 June 2006?; and

(d) Whether plaintiff has proved causation; ie, whether it was the alleged delay that caused to the plaintiffs' condition?. B

Standard Of Care

[15] The Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 adopted the test laid down in the Australian case of *Rogers v. Whitaker* [1992] 175 CLR 479. The Federal Court in following *Rogers v. Whitaker* (*supra*), held that the standard of care is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of medical opinion. It is now a question which is for the ultimate consideration of the courts and no longer one for the medical profession to decide through a responsible body of medical opinion. C D

[16] Thus even if the question of reasonable standard of care now rests ultimately with this court and not with the medical profession. Evidence of accepted medical practice is still a useful guide which the courts ought to have reference to, in order to assist them, to come to a finding. This was acknowledged by the Australian High Court in *Rogers v. Whitaker* (*supra*) which held that although it is for the court to adjudicate on what is the appropriate standard of care, evidence of accepted medical practice is still a useful guide (refer to para. 52 of *Foo Fio Na*'s case (*supra*)). E F

[17] The test in *Rogers v. Whitaker* (*supra*) adopted by the Federal Court in *Foo Fio Na*'s case (*supra*), was formulated as follows:

> In Australia it has been accepted that the standard care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* Principle has not always been applied. *Further, and more importantly, particularly in the field of non-disclosure of risk and the provision of advice and information, the Bolam Principle has been discarded and, instead, the courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care giving weight to the paramount consideration that a person is entitled to make his own decisions about his life*. (emphasis added) G H I

[18] In *Mathew Scott Oakley & Ors v. Dr George Varughese & Anor* [2010] 10 CLJ 322 the court *inter alia* held as follows:

> I must hasten to add that medical practitioners should not be unduly worried with this state of affairs. *In the case of diagnosis and treatment, the court would have to rely on expert opinion. Standards and practices generally accepted by distinguished members of the medical profession will normally be decisive*. In *Bolitho*, Lord Browne Wilkinson reiterated (at page 779):
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> > I emphasise that, in my view, it will be **very seldom be right for a judge to reach the conclusions that the views genuinely held by a competent medical expert are unreasonable...** It is only where a judge can be satisfied that the body of expert opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed. (emphasis added)

Consideration Of The Relevant Issues Arising

Issue [1]: Whether There Was A Failure To Advise The Mother For An Elective Caesarian Section Since The Mother Was A High Risk Patient And Since The Mother Requested For The Same.

[19] PW1, the plaintiff's expert witness, highlighted on the ante natal visit of the plaintiff's mother on 3 June 2006, at pp. 179 and 180 of bundle D1. PW1 testified that the asterisk states this patient considering LSCS which is a caesarian section and to discuss with specialist during TCA (ie, next visit of patient). This indicates that the mother had expressly requested for caesarian section. However there is nothing stated in the doctor's notes that this request was considered at all.

[20] Further the defendant's specialist, Dr Irishah, the third defendant who examined the plaintiff's mother on 3 June 2006 at 1.52pm, did not give evidence, to explain or clarify. In the circumstances, this court is minded to draw an adverse inference under s. 114(g) of the Evidence Act 1950, against the defendants. It is noted that the plaintiff' mother in her testimony, clearly stated that she did discuss with the doctor about having a caesarian section and as the doctor was of the view that she should try for a natural birth, she went along with his advice. There is no evidence that when she attended at the hospital on 6 June 2006, the doctors were aware that the plaintiff's mother had made a request for a caesarian section on 3 June 2006.

[21] The plaintiff's mother was seen by Dr Hazfaneeza, the fifth defendant at 11.20am on 6 June 2006 and there is no note stating that Dr Hazfaneeza had despite the fact that the mother was a high risk patient, advised her that she should have a caesarian section. The note

simply stated "to admit LR. To allow SVD." Further in her witness statement, Dr Hazfaneeza did not state that she had counselled the mother and her husband since the mother was a high risk patient and a caesarian section should be conducted. However under cross examination, Dr Hazfaneeza testified that she did give the option to the plaintiff's mother as follows: "I spoke to the patient and her husband in the Patient Assessment Centre regarding options alternative vaginal delivery and caesarian sections with the risks for each. The patient agreed for vaginal delivery after discussions.

[22] This court finds that there is no corroborative evidence that any such discussion took place between Dr Hazfaneeza and the plaintiff's mother or her husband, especially since the records did not reflect that such a discussion took place. Further it was never put to the plaintiff's mother (PW5) that any such discussion between Dr Hazfaneeza and the plaintiff's mother had taken place and option for caesarian section or vaginal delivery had been discuss and she opted for vaginal delivery.

[23] From the above events, it showed that the recommendation of Dr Irishah, the third defendant made on 3 June 2006 was ignored and Dr Hazfaneeza, the fifth defendant who saw the plaintiff' mother on 6 June 2006 was a medical officer, with little experience of two and half months as at 6 June 2006. Thus it is reasonable to infer that Dr Hazfaneeza did not read the clinical notes made on 3 June 2006 of Dr Irishah, to refer the mother to a specialist to discuss her request for a caesarian section.

[24] The testimony of DW3, Dr Noor Sham bin Yahya Luddin, the fourth defendant stated that her first encounter with the plaintiff's mother was at 4.40pm on 6 June 2006 and that she was made to understand that the plaintiff's mother was counselled about the modes of delivery but had opted for vaginal delivery. This court agrees with the plaintiff's contention that DW3's evidence must be treated with caution because DW3 stated she was made to understand, thus indicating that she did not state that she read the medical records of the plaintiff's mother or was expressly briefed by Dr Hazfaneeza about the plaintiff's mother, opting for vaginal delivery. DW3 did not state that DW4 had seen the plaintiff's mother and husband and the options of caesarian were explained to them and they decided to have a vaginal delivery.

[25] More importantly, Dr Philip the defendant's specialist who attended to the plaintiff's mother on 8 May 2006, was not called as a witness and it was not put to PW5, the plaintiff's mother that she had a discussion with Dr Philip and had decided to undergo a vaginal delivery. Finally DW3 agreed that when the plaintiff's mother came on

3 June 2006 and requested for a caesarian section and since she was a high risk patient, a caesarian section should have been conducted on the mother.

[26] In the absence of any explanations from two material witnesses namely Dr Irishah, the third defendant and Dr Philip, who were not called as witnesses, pertaining to the request by the plaintiff's mother for caesarian section, this court is left wondering what actually transpired at the discussion between the mother and Dr Philip on 8 May 2006 and Dr Irishah on 3 June 2006. No explanation was offered at all by the defendant as to why the said two witnesses were not called as witnesses. In the circumstances, this court will invoke on s. 114(g) of the Evidence Act 1950 and draw an adverse inference against the defendants.

[27] On the other hand, the plaintiff's expert, PW1 testified that in modern obstetric practice, the current consensus is that it is recommended that for multiple pregnancies including twin pregnancy, the mode of delivery should be elective caesarean because of the increased morbidity and mortality with vaginal twin delivery especially the second twin. Another reason stated by PW1 is "that in the current obstetric and gynecology world it is noted that the aginal delivery of twins has declined as no proper training has not been provided to doctors because the senior doctors themselves do not have this skill. It is observed that currently many doctors are not very competent in doing safe vaginal delivery for twins and that's the reason he advise elective caesarian section."

[28] PW1 further testified that twin pregnancy is one risk factor and the second risk factor was primary infertility successfully treated and therefore an elective caesarian would definitely be indicated in this case. From an examination of the medical records, this was not considered or planned for this case, at all. PW1 was of the view that the mother should have been advised to have an elective caesarian section which she was not.

[29] The defendants contended that DW2's and DW3's testimonies were never shaken and the explanations given by DW2 and DW3 were cogent and credible. Further the plaintiff and the plaintiff's mother were give appropriate and professional treatment by the defendants who are experienced specialists in their respective fields, in providing medical services at the material times.

[30] In respect of the testimonies of DW2 and DW3, who are defendants herein, this court finds that their testimonies are self serving and are not unsupported or corroborated by any medical literature or independent medical experts. This court prefers the testimonies of PW1, Dr Ong, an independent and emminent obstetrician and gynaecologist,

whose expert reports P2 and P3, stressed the need that the plaintiff's mother should have been advised on the need for an elective caesarian section especially since she was a high risk patient and the failure to do so, is not in accordance with accepted obstetric practice.

Issue [2]: Whether Plaintiff's Mother Consented To The Caesarean Procedure Conducted By The Defendants On 6 June 2006?

[31] The defendants contended that from the evidence during the trial, the plaintiff' mother, PW5 during cross-examination admitted that she did sign the "Keizinan Pembedahan" (exh. D19) and that she had consented to the caesarean procedure and the doctors did explain to her, the procedure that she will undergo.

[32] Even though she consented to the said caesarean procedure at the material time, this court finds that the fact that PW5 consented to the said caesarean procedure was not relevant in so far as the plaintiff's pleaded case is concerned, which was that the defendants failed to make a decision to carry out a caesarian section on the plaintiff's mother earlier when there were signs that a caesarian section had to be carried out, especially in view of the plaintiff's mother's medical history of primary infertility for four years. The failure of the defendants, to advise the plaintiff's mother that the delivery of twins in this case was high risk and thus a caesarian section ought to have been carried earlier on an elective basis. Further the defendants' witnesses agreed that the plaintiff's mother was a high risk pregnancy. Thus the defendants ought to have considered and advised the plaintiff's mother to undergo caesarian section earlier on an elective basis.

[33] In the light of the above, thus the fact that the plaintiff's mother consented to the said caesarean procedure at the material time, is irrelevant.

Issue [3]: Whether The Treatment Given To The Plaintiff And The Plaintiff's Mother On 6 June 2006 Was Appropriate?

[34] This court finds that the treatment given to the plaintiff and the plaintiff's mother on 6 June 2006 was not appropriate based on the reasons stated earlier and hereinafter appearing.

[35] The plaintiffs contended that the defendants including Dr Irishah, Dr Hazfaneeza and Dr Noor Syam who are third, fifth and fourth defendants respectively, are in breach of the standard of care, expected of them based on the test as laid out in *Foo Fio Na*'s case (*supra*) above. Further the plaintiff's mother should have been advised by the defendants that she required an elective caesarian section because she was considered a high risk pregnancy and this was considered at all, despite her, requesting for a caesarian section. The defendants instead

advised her that she should have a vaginal delivery which is contrary to the testimony of PW1, the plaintiff's independent expert. Other than the testimonies of the third defendant (Dr Irishah), the fifth defendant (Dr Hazfaneeza) and the fourth defendant (Dr Noor Syam) the defendants have not adduced any evidence to show that they met the standard of care expected of them.

[36] The defendants knowing that the plaintiff's mother's pregnancy was a high risk, ought to have advised and planned for a possible caesarian section, by getting ready the operating theatre and/or have a specialist to handle the delivery of the plaintiff and attending to the plaintiff's mother. From the evidence adduced, the above was not considered or planned for at all which resulted in the fatal delay of the plaintiff.

[37] This court would be most cautious in accepting the evidence of the witnesses of the defendants as most of the witnesses are defendants in the present case and that their evidence would be self serving. Furthermore their testimonies are not supported or corroborated by any independent expert evidence especially on the issue of the decision, not to conduct an elective caesarian section on the plaintiff's mother was acceptable in the circumstances of this case.

[38] As stated earlier, the Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 laid out extensively the standard of care expected of a doctor. The Federal Court stated that the legal position in *Bolam*'s case (*supra*), stipulates two important requisites that is firstly the doctor must have acted in accordance with accepted medical practice and the practice must be regarded as proper by a responsible body of medical men in that art.

[39] This court finds that the defendant has failed to show that they have acted in accordance with accepted medical practice and their practices were regarded on proper by a responsible body of medical men in their art.

Issue [4]: Whether There Was A Failure To Have A Safe Obstetric System In Hospital Selayang When The Decision To Carry Out Emergency Lower Segment Caesarian Section Was Made At 9.40pm And The Emergency Caesarian Section Was Only Carried Out At 10.25pm And The Plaintiff Was Delivered At 10.34pm On 6 June 2006?

[40] This court finds that there was a failure on the part of the defendants, to have a safe obstetric system in Hospital Selayang when the decision to carry out emergency lower segment caesarian section of the plaintiff's mother was made at 9.40pm and the emergency caesarian

section only commenced at 10.25pm and the plaintiff was born at 10.34pm on 6 June 2006 for the reasons stated earlier and hereinafter appearing.

[41] The defendants contended that as soon as the CTG tracings showed there was a recurrent decelerations on the second twin indicating that the second twin was in distress, immediate action was taken by DW3, to prepare for an emergency caesarean section. During cross-examination DW3 testified that as soon as the CTG tracing was traced, the plaintiff's mother was sent to the labour room. Further, DW3 stated that records showed that during the CTG tracing there was no liquor at all, ie, it was clear. In other words, there was no meconium at all and this shows that the there was no delay here. If there was a delay here, surely, there must be a meconium recorded in the reports. DW3 also disagreed with the plaintiff's counsel that the delay had caused a poor outcome of the plaintiff. DW3 in fact repeatedly testified that the CTG tracing of the plaintiff was all along reactive, ie, normal and that the second twin was having a fetal distress as shown in the CTG tracing of the second twin. DW3 was sure as an internal CTG was connected to the second twin. Thus, there was no delay at all in delivering the plaintiff. All immediate action was taken as soon as a fetal distress detected during the delivering process.

[42] The defendants also contended that a lack of resources in public hospitals ought to be considered by the court in deciding medical negligence cases. For example, lacking of a copy of CTG tracing facilities in Hospital Selayang. The constraints within which public hospitals function must be considered by this court. The defendants then referred to two cases, namely:

(i) *Jacob Mathew v. State of Punjab & Anor* [2006] 6 CLJ 162, where the court held *inter alia* as follows:

> The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work "Errors, Medicine and the Law" (Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event a tendency which is closely linked with the desire to punish ...
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> The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless ...

> One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

Further, at pp. 192 and 193, the Supreme Court of India concluded that:

> Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.
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> ... The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(ii) In *Hardaker v. Newcastle HA* [2001] Lloyd's Rep Med 512, the court held *inter alia* that the duty of care which was owed by the health authority to the plaintiff was qualified by the resources available to them.

[43] The plaintiff contended *inter alia* as follows: A

(i) The defendants took too long to deliver the plaintiff when the decision to carry out the caesarian was made;

(ii) No preparation of the operation theatre which could be used for the delivery of the plaintiff in sufficient time; B

(iii) Failure to obtain assistance from a specialist in sufficient time to deliver the the plaintiff;

(iv) Failure to identify and anticipate that the delivery of the plaintiff, require the attendance of specialist at the material time, to avoid any injury to the plaintiff; C

(v) Failure to use a safe obstetric system in the delivery of the plaintiff;

(vi) Failure to take reasonable steps in proper time to avoid the severe birth asphyxia suffered by the plaintiff. D

[44] The chronological events pertaining to the labour of the plaintiff's mother is as follows:

11.20 AM (p.181 D1) : Seen by Dr Hazfaneeza E
Cervix : 3-4cm
CTG 1 : Reactive
CTG 2 : Reactive : CTG monitoring

12.45 pm (p184 and 185) : Seen by Dr Patricia
Cervix : 4cm F
CTG 1 in PAC : Reactive
CTG 2 in PAC : Reactive

1620 hours (4.20 pm) (p. 188) : Reviewed at 1700 hours CTG decelerate

Noted to Dr. Hazfaneeza to review at 9 pm. G

1640 (4.40 pm)(p. 192) : Seen by Dr Noor Sham
Cervix : 7cm
CTG 1 in PAC : Reactive
CTG 2 in PAC : Reactive H

2040 : Seen by Dr Noor Sham/Dr Hazfaneeza
Cervix : 9cm
CTG 1 in PAC : Reactive
CTG 2 in PAC : Reactive

2110 (9.10 hours) (p. 189) : Cervix fully dilated I
FHH first twin : 146 bpm
FHH second twin : noted bradycardia, down to 90 BPM

A After 30 min in second stage and due to CTG second twin persistent Type 1. Plan by Dr Nor Syam for emergency LSCS for fetal distress.

2140 (9.40 pm) (p. 194) : Seen by Dr Noor Sham

B 30 min. at the second stage but no descent, poor maternal efforts, noted fetal bradycardia for second twin : persistent.

Plan for emergency LSCS

10.25 : Time caesarian section started (p. 144) D1
10.34 : Delivery of plaintiff (first twin) (p. 198 D1)
C 10.35 : Delivery of second twin (p. 198)

[45] The material times to be borne in mind is when the plaintiff's mother's cervix was fully dilated at 9.10pm and there was fetal distress detected in the second twin. The plaintiff's mother was reviewed at D 9.40pm. As there was poor descent and persistent fetal distress in the plaintiff, a decision was made to conduct an emergency lower segment caesarian section by the fourth defendant, Dr Noor Sham.

[46] The operation only commenced at 10.25pm and the plaintiff was delivered at 10.34pm. In the circumstances it took one hour 24 minutes E to deliver the plaintiff from the time of detection of fetal distress at 9.10pm or 56 minutes to deliver the plaintiff from the time of decision, to conduct an emergency caesarian section on the plaintiff's mother.

[47] In P3, the expert report by PW1, it states that in essence the F plaintiff was delivered one hour 24 minutes after the onset of second stage labour. This time interval can be considered as delayed. This delay would have caused fetal distress on the plaintiff. PW1 further stated the plaintiff was born in a very severe state, the difficulty is in the delivery alone.

G **[48]** In *James v. Camberwell Health Authority* [1994] 5 Med LR, the court held *inter alia* as follows:

> Nor is it insignificant that before the error with the clock timing had been appreciated, thirty-five minutes was being asserted as the maximum non-negligent time between the onset of crisis and delivery H which again is almost precisely what was achieved.

[49] This court agrees with the plaintiff's contention that the window of 35 minutes is the non-negligent time frame for delivery after onset of crisis (fetal distress). If the said crisis occurred at 9.10pm when fetal I distress was detected or at 9.40pm when the decision to conduct emergency caesarian section was made, a period of greater than thirty

five minutes have elapsed until the delivery of the plaintiff, at 10.34pm. It is pertinent to note that no CTG tracings are available after 9.40pm to indicate what the fetal heart rate was in the plaintiff.

[50] The defendants contended that the fetal heart of the plaintiff was normal but they are unable to support this with a CTG tracing after 9.40pm. Neither did they adduce any expert evidence or call the specialist, Dr Irishah the third defendant who delivered twin No. 1 (the plaintiff), to confirm or corroborate this contention.

[51] When the decision to conduct an emergency caesarian of the plaintiff's mother is made at 9.40pm, the caesarian section only commenced at 10.25pm and the plaintiff was delivered at 10.34pm. No evidence was tendered why there was a delay in getting the plaintiff's mother to the operating theatre and why the caesarian operation only commence at 10.25pm.

[52] It must be noted that no specialist attended to the delivery of the twins despite the plaintiff's mother, being a high risk case. The delivery of the plaintiff, was instead attended to, by a medical officer, Dr Syariza Shahar, DW4. When the said medical officer, DW4 had difficulty in delivering the plaintiff, she had to seek assistance from the specialist, Dr Irishah, the third defendant before the plaintiff was finally delivered at 10.34pm.

[53] It is reasonable to infer that a safe obstetric system would require an emergency lower segment caesarian particularly to a high risk patient, such as the plaintiff's mother, to be attended to promptly, anticipate difficulties and have a specialist to conduct the delivery or to be immediately available to prevent any injury to the baby. In this case there was an unexplained delay from the time of decision to conduct an emergency caesarian section to the time of delivery of the plaintiff which was 54 minutes and such delay was fatal.

[54] In *Bull & Anor v. Devon Area Health Authority* [1982] 22 BMLR 79, the Court of Appeal held *inter alia* that the plaintiff had succeeded in proving that the failure to provide prompt attention the plaintiff needed, was attributable to the negligence of the defendants in implementing on unreliable and essentially unsatisfactory system for calling the registrar resulting in delay to delivery of the plaintiff.

[55] In the present case, the unsafe obstetric system is the delay in commencing the caesarian section upon fetal distress being detected and decision made for an emergency caesarian section to be conducted and not having a specialist to conduct the delivery of a high risk patient like the mother of the plaintiff resulting in severely asphyxiated state of the baby.

[56] In *Muhammad Yassien Zuliskandar & 2 Ors v. Kerajaan Malaysia* (unreported High Court Decision High Court of Malaya Ct Johor Bahru Guaman Sivil No. MT5-22-763-2008), the court held *inter alia* that a system failure could constitute negligence. In this case it was held that it was a high risk case and SD1 did not refer the case to her superior officers but entrusted the delivery to a junior house officer whilst she attended to another case. It was held that this was a case that should have been attended to by a specialist but unfortunately was handled by a medical officer, with only four months' experience.

[57] The delivery of the plaintiff was not undertaken by Dr Noor Sham who was the specialist on call who made the decision to conduct the said caesarian section but by DW4, Dr Syariza who was a medical officer of three years experience. DW4 stated that she took seven minutes before she realised she could not deliver the baby and asked the assistance of the said Dr Irishah, to help to push the fetal head from below and faced some complication when she had to ask Dr Irishah to take over. DW4 pushed the fetal head from below and Dr Irishah delivered the baby. This took place between 10.27pm to 10.34pm. As stated earlier, Dr Irishah, the third defendant was the doctor who delivered the plaintiff but Dr Irishah was not called to give evidence and no explanation was given as to why he was not called as a witness. In the circumstances, this court is constrained to invoke s. 114(g) of the Evidence Act 1950 against the defendants.

[58] The testimony of Dr Syariza (DW4) the sixth defendant herein, is self serving and not supported by the evidence of the specialist, Dr Irishah, the third defendant who eventually delivered the baby. As stated in the case of *Muhammad Yassien* (*supra*) the court held *inter alia* on follows:

> as noted in Dewhurst's Textbook of *Obstetrics and Gynaecology for Postgraduates* (p. 386).
>
> Malpositions and malpresentations carry an increased risk for both mother and fetus which is greatest when the mother is unattended or is managed during labour by inexperienced personnel.

[59] In the present case the plaintiff's head was deeply engaged (ie, malposition) and the attempted delivery by an inexperienced medical officer, DW4 has resulted in further delay and contributed to severely asphyxiated state of the plaintiff. DW3, Dr Noor Syam did not carry out the said delivery and neither did she refer the plaintiff's mother to a specialist, to conduct the delivery even though she knew there was poor descent of head and the mother was a high risk patient.

Issue [5]: Whether Plaintiff Has Proved Causation; Ie, Whether It Was The Alleged Delay That Caused To The Plaintiff's Condition?

[60] The defendants contended that the plaintiff has failed to prove causation, that is the causal link between the alleged delay that caused to the plaintiffs' condition. The defendants' stand is that there was no delay in the treatment of the plaintiff nor to the plaintiff's mother at Hospital Selayang. It is trite that the onus is on the plaintiff to prove causation, that is that there was a causal link between the alleged breaches of duty or negligence and the eventual outcome to the claimant. This must be proved on a balance of probabilities.

[61] This principle is laid down in a number of cases:

(i) In *Udhaya Kumar Karuppusamy & Anor v. Penguasa Hospital Daerah Pontian & Ors* [2005] 1 CLJ 143, the court held as follows:

> ...the onus was on the plaintiffs to show, on a balance of probabilities, that there was a causative link between the resultant damage and the negligent act of the defendants (*Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871). But the plaintiffs failed to show that the resultant mental retardation was caused by any negligent act of the defendants. And even if there were a *prima facie* case under the doctrine of *res ipsa loquitor*, the defendants had rebutted negligence. Fairly said, the evidence of the case negated all negligence on the part of the defendants.

(ii) In *Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor* [2007] 5 CLJ 38, the Court of Appeal at pp. 46 and 47 held as follows:

> In my judgment, like the case against the first defendant, the plaintiff's case against the second defendant must, to succeed depend upon proof of causation. Taking into account all the facts alluded to in the previous paragraph of this judgment and giving them the maximum weight they deserve, the plaintiff's still fall short of establishing that the negligence if any on the part of the second defendant caused the deceased's death ... Therefore the primary burden of proving causation lay on the plaintiffs.

(iii) In *Payremalu Veerappan v. Dr Amarjeet Kaur & Ors* [2001] 4 CLJ 380; [2001] 3 MLJ 725, the court held at p. 741 as follows:

> As to causation, it is relevant in cases of medical negligence to consider the causative link between the injury that was sustained by the plaintiff himself prior to seeking medical treatment and the act of the doctor in this case, the act of the first and second defendants, but, unfortunately, this evidence was lacking. This

court is of the view that the allegations of negligence pleaded under the particulars of negligence as set out in the statement of claim must be established by the plaintiff on a balance of probabilities, unless there are positive proven facts from which the court could draw an inference of the causation.

(iv) In the English case of *Wilsher v. Essex Area Health Authority* [1988] All ER 871 at p. 872, the House of Lords held *inter alia* that:

> ... Instead the burden remained on the Plaintiff to prove the causative link between the Defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the Plaintiff's retinal condition could have been caused by any one of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the Plaintiff had not discharged the burden of proof as to causation.

[62] The defendant's contended that there was no delay in delivering the plaintiff's condition as the reports shows that there was a clear liquor and that the plaintiff's condition ie, cerebral palsy, was not caused by any negligence on the part of the defendants. Hence, the plaintiff failed to establish causation, ie, that the negligence of the defendants which caused the cerebral palsy suffered by the plaintiff.

[63] The law in respect of causation is that the plaintiff need only to prove, a material contribution by the defendant's breach of duty to the damage suffered by the plaintiff. The material contribution test has been laid down by the Federal Court in the case of *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409; [2011] 2 MLJ 1 where the Federal Court defined "material contribution" as a factor which as "neither trivial or insignificant".

[64] Based on the expert reports P2 and P3 respectively, the testimony of the plaintiff's expert, PW1, and the circumstances of the present case, this court finds on a balance of probabilities proved that the cerebral palsy suffered by the plaintiff, was caused by the defendants. There was no rebuttal evidence adduced by the defendant, as to how the plaintiff could have been born with cerebral palsy without the acts or omissions of the defendants. Further the plaintiff's expert, PW1 was not challenged to any other causes of cerebral palsy.

[65] It is noted that no evidence was adduced by the defendants or more importantly, by an independent expert witness, that the cause of the plaintiff's cerebral palsy was attributable to any other reason or causes. Based on the unrebutted expert evidence of the plaintiff's expert, PW1, the plaintiff has succeeded in proving the issue of causation.

[66] The failure to carry out an elective caesarian section on the plaintiff's mother before 10.25pm on 6 June 2006 and/or the delay in delivery of the plaintiff, was certainly a factor which was neither trivial or insignificant and therefore the test for causation is satisfied. This court finds that the plaintiff has proved on a balance of probabilities that the breach of duty by the defendants has materially contributed to the injuries suffered by the plaintiff namely involving cerebral palsy secondary to perinatal asphyxia epilepsy and left hemiplegia.

[67] In the present case, it is clear that the plaintiff was born in a severely asphyxiated state and the plaintiff's injury has been proved. There was no evidence from any expert or non treating doctor, to rebut the plaintiff's evidence on causation. The plaintiff's expert PW1 was never challenged on any other reason which might have caused the plaintiff's cerebral palsy. The testimony of PW1 is clear which is that if the delivery of the plaintiff had taken place earlier, the plaintiff would not have been born in a state of severe birth asphyxia. This is unrebutted by any expert evidence on behalf of the defendants. In the present case there has been no other cause which the defendants have proved birth asphyxia and cerebral palsy is attributable to.

[68] In *Bailey v. Ministry of Defence* [2008] EWCA Civ 883, Waller LJ held as follows:

> In a case where medical science cannot establish the probability that "but for" an act of negligence, the injury would not have happened, it would be open to the court to draw a conclusion that the defendant had caused the harm suffered, on the basis that the contribution of the negligent cause to the harm suffered by the claimant was more than negligible.

[69] This court finds that the cases quoted and/or relied upon by the defendants can be distinguished from the present case and finds that they are irrelevant.

Issue [6]: The Liability Of The First And Second Defendants Namely Vicarious Liability Or Non Delegable Duty Wherein The Owner Or Operator Of The Hospital Is Liable For The Acts Of It's Servants And/Or Agents Or If There Is System Failure Direct Liability Of The First And Second Defendants

[70] This court finds that there is system failure in the hospital at the material time, thus the first and second defendants are vicariously liable as the owner or operator of the hospital.

[71] Hospital Selayang at all material times was under the care and control of the first and second defendants and was a hospital providing medical treatment and advice to the public on payment of fees at their

premises known as Hospital Selayang, Lebuhraya Selayang Kepong, 68100 Batu Caves through their consultants and specialists as their servants and/or agents and provided facilities including obstetric and gynecological facilities (paras. 1 and 2 of the amended statement of claim p. 7 of bundle B and para. 2 of the pernyataan pembelaan terpinda defendan-defendan).

[72] In *Chung Chu Yin & Yang Lain lwn. Dr Jimmy Tang Sek Cheong & Satu Lagi* [2012] 5 CLJ 86, the court held that the legal principle with regards to vicarious liability for a hospital regarding the negligence of the doctors practicing there has been decided in the case of *Roe v. Minister of Health* [1954] 2 QB 66 where Lord Denning stated:

> The hospital authorities are responsible for the whole of their staff and not only for the nurses and doctors, but also for anaesthetists and surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part time. The hospital authorities as responsible for all of them. The reason is because even if they are not servants, they are agents of the hospital to give treatment.

In the aforesaid case the hospital was found to be vicariously liable for the negligence of the doctor.

[73] In *Liau Mui Mui v. Dr R Venkat Krishnan* [1999] 1 CLJ 207, a clinic holding a hospital license was held to be liable for the acts of a locum under the doctrine of non delegable duty.

[74] In *Cassidy v. Ministry of Health* [1951] 1 All ER 574, Denning CJ held *inter alia* that the authorities who employed staff are liable whenever they accept a patient for treatment and if the staff are negligent, the hospital authorities are just as liable. The learned judge was of the view that a hospital was under a non delegable duty to treat the patients which could not be discharged by delegating it to a consultant under a contract for services.

[75] Since this court finds that there was a system failure in Hospital Selayang in respect of the delay in delivery of the plaintiff or the absence of a specialist to conduct delivery of the plaintiff then the first and second defendants are directly liable. The Government of Malaysia was held liable for a system failure in the Hospital Sultan Aminah in Johor Bahru in the case of *Muhammad Yassien Bin Zuliskandar & 2 Ors v. Kerajaan Malaysia* (unreported decision of the High Court *vide* Johor Bahru Civil Suit No: MT5-22-763-2008). It was stated in the aforesaid case that although the hospital is a very busy hospital, nevertheless this cannot be an excuse for not following a safe system of delivery.

Order

[76] In the light of the above, this court finds that the plaintiff has proved its case against the defendants on a balance of probabilities and I grant an order in terms of the plaintiff's statement of claim with costs. I award the following damages and interests:

[77] General Damages

General damages for pain and suffering and loss of amenities	RM250,000

[78] Special Damages

Cost of care (pre trial)	
(i) Cost of care from June 2006 - December 2008	RM24,000
(ii) Cost of care from January 2009 - 29 March 2013	RM219,300
Cost of diapers (pre trial)	
(i) For first four years up to 6 June 2010	RM7,200
(ii) From 1 July 2010 - 29 March 2013	RM2,310
	RM9,510
Cost of physiotherapy (pre trial)	
(i) From 1 January 2007 - 29 March 2013	RM72,000
Cost of occupational therapy (pre trial)	
(i) From 1 January 2007 - 29 March 2013	RM30,000
Cost of future speech therapy (pre trial)	
(i) From 1 January 2007 - 29 March 2013	RM37,500
Medical expenses (pre trial) For six years	RM6,000

[79] Future Expenses

(a) Cost of future medical aids	
(i) Cost of Splint	RM66,000

A (ii) Cost of Solid Foot Orthosis and Special Shoes RM65,340

(b)	Cost of future surgery	RM7,000
(c)	Cost of future care	RM1,227,600
(d)	Cost of future diapers	RM55,440
(e)	Cost of future physiotherapy	RM823,680
(f)	Cost of future occupational therapy	RM316,800
(g)	Cost of future speech therapy	RM396,000
(h)	Cost of future medical expenses	RM66,000

[80] Interests

I award interests as follows:

(i) on special damages at the rate of 4% per annum from 6 June 2006 to date of judgment.

(ii) on general damages at the rate of 8% per annum from 20 May 2009 to date of judgment.

(iii) on the judgment sum at the rate of 5% per annum from date of judgment to date of full realisation.